Supreme Court, U.S.
FILED
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No. 98 1883

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE DOHERTY, an individual, and
dba The Menlo Club,
Petitioner,

v.

WIRELESS BROADCASTING SYSTEMS
OF SACRAMENTO, INC., a California corporation
dba Pacific West Cable Television,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does Title 47 United States Code, Sections 553 and 605 permit a right to indemnity for innocent aggrieved parties who have been sued pursuant to this title and sections?

II. Assuming a right of indemnity exists, may an aggrieved party be awarded attorney fees for services performed in the United States District Court and in the United States Court of Appeals, Ninth Circuit, to present evidence in prosecution of a claim for indemnity?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, BRUCE DOHERTY, an individual, and BRUCE DOHERTY, doing business as THE MENLO CLUB, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Ninth Circuit, is reported as 97-16046, and was entered on July 1, 1998, which affirmed the judgment of the United States District Court, entered on May 5, 1997, and is reproduced in the Appendix filed herewith (**App. A, 1a**). Petitioner filed a petition for rehearing on July 14, 1998, which was denied by the United States Court of Appeals, Ninth Circuit, on February 16, 1999; the order of denial is reproduced in the Appendix filed herewith (**App. B, 6a**). Also on February 16, 1999, the United States Court of Appeals, Ninth Circuit, affirmed the judgment of the United States District Court; the order of affirmance is reproduced in the Appendix filed herewith (**App. C, 10a**).

The Memorandum and Order of the United States District Court granting the motion for summary judgment on petitioner's third-party complaint for indemnity was entered on December 26, 1996; this Memorandum and Order is reproduced in the Appendix filed herewith (**App D, 12a**). Thereafter, a Judgment in a Civil Case in favor of PACIFIC WEST and against DOHERTY was entered on May 5, 1997; this Judgment in a Civil Case is reproduced in the Appendix filed herewith (**App. E, 22a**). On September 3, 1997, the United States District Court, Eastern District of California, entered an Order regarding Attorneys' Fees; this Order is reproduced in the Appendix filed herewith (**App. F, 24a**).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

STATUTES INVOLVED

The pertinent parts of the two statutes involved are set forth below, being Title 47 U.S.C., sections 553 and 605, respectively.

Title 47, section 553 reads verbatim as follows:

> **"553. Unauthorized reception of cable service**
>
> **(a) Unauthorized interception or receipt or assistance in intercepting or receiving service; 'assist in intercepting or receiving' defined**
>
> **(1)** No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.
>
> **(2)** For the purpose of this section, the term 'assist in intercepting or receiving' shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

(b) Penalties for willful violation

(1) Any person who willfully violates subsection (a)(1) of this section shall be fined not more than $1000 or imprisoned not more than 6 months, or both.

(2) Any person who violates subsection (a)(1) of this section willfully and for purpose of commercial advantage or private financial gain shall be fined not more than $25,000 or imprisoned for not more than 1 year, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense.

(c) Civil action in district court; injunctions; damages; attorney's fees and costs; regulation by States or franchising authorities

(1) Any person aggrieved by any violation of subsection (a)(1) of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(2) The court may---

(A) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)(1) of this section;

(B) award damages as described in paragraph (3); and

(C) direct the recovery of full costs, including awarding reasonable attorney's fees to an aggrieved party who prevails.

(3) (A) Damages awarded by any court under this section shall be computed in accordance with either of the following clauses:

(i) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(ii) the party aggrieved may recover an award of statutory damages for all violations involved in the action, in a sum of not less than $250 or more than $10,000 as the court considers just.

(B) In any case in which the court finds that the violation was committed willfully and for purpose of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory under subparagraph (A), by an amount of not more than $50,000.

(C) In any case where the court finds that the violator was not aware and had no reason to believe that his

acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100.

(D) Nothing in this subchapter shall prevent any State or franchising authority from enacting or enforcing laws, consistent with this section, regarding the unauthorized interception or reception of any cable service or other communication service."

*** ***

Title 47, section 605 reads verbatim in pertinent part as follows:

"605. Unauthorized publication or use of communications

(a) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communications centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio

communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if---

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which---

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

. . .

(d) Definitions

For purposes of this section---

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual

characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include that gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors or satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (d) of this section shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more

than $2000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of subsection (d) of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court---

(i) may grant temporary and final injunctions or such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(1) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the

following subclauses:

(i) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the elements of profit attributable to factors other than the violation; or

(ii) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a

violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.

. . .

(f) Nothing in this section shall affect any right, obligation, or liability under Title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State or local law.

. . . . . ".

STATEMENT OF THE CASE

A. Procedural History

EVENT ENTERTAINMENT, INC. ("EVENT") sued BRUCE DOHERTY, individually and doing business as THE MENLO CLUB ("DOHERTY"), for damages and injunctive relief, pursuant to 47 U.S.C. section 553, et. seq., and 47 U.S.C. section 605, et. seq., as authorized by 28 U.S.C. section 1331 (civil action brought under the laws of the United States). DON KING PRODUCTIONS/KINGVISION ("DON KING") sued DOHERTY in an almost identical suit, represented by the same attorney as represented EVENT.

EVENT/DON KING both claimed they paid for proprietary rights to distribute two televised boxing matches, one on December 10, 1994, the Chavez vs. Lopez match, and the other on February 18, 1995, the Oscar de LaHoya vs. John Molina match. Both suits claimed DOHERTY, without authorization, intercepted these programs and exhibited these programs, for private financial gain. DOHERTY in fact showed these programs to his patrons in THE MENLO CLUB, a tavern, consisting of two boxing matches appearing

on two dates: on December 10, 1994 (Chavez vs. Lopez) and on February 18, 1995 (Oscar de LaHoya vs. John Molina, and James Toney vs. Montell Griffin). This conduct was alleged in the two suits to have been in violation of 47 U.S.C. sections 553, et. seq., and 605, et. seq.; additional counts alleged the conduct constituted conversion and intentional interference with prospective economic advantage. These suits were later consolidated; for the sake of clarity, **EVENT, plaintiff, was designated as the lead plaintiff**, and as the procedural history of both plaintiff cases (DON KING and EVENT) was identical in all substantive respects, petitioner hereafter refers to both plaintiffs as "EVENT". DOHERTY answered, denying liability as to both suits.

Thereafter, DOHERTY sued Wireless Broadcasting Systems, doing business as Pacific West Cable ("PACIFIC WEST") by third party complaint for implied contractual indemnity and indemnity for negligence. This suit alleged a written contract between DOHERTY and PACIFIC WEST whereby PACIFIC WEST would provide DOHERTY in his place of business, THE MENLO CLUB, for a monthly fee, pay television programming. PACIFIC WEST provided and installed receiving equipment for receipt of television broadcasts. The contract between DOHERTY and PACIFIC WEST was for basic cable programming, and did not include all programming PACIFIC WEST provided to all of its customers.

PACIFIC WEST answered the third party complaint for indemnity, denying liability. The contract between PACIFIC WEST and DOHERTY provided for the exclusive retention by PACIFIC WEST of ownership of all installed cable equipment and maintenance.

The availability of the remedy of indemnity is the key issue in this case. This remedy is not specifically mentioned in the statutory scheme of either section 553 or section 605 of 47 U.S.C. However, the availability of this remedy should be implied from these statutory schemes.

PACIFIC WEST filed a Motion for Summary Judgment with supporting memoranda of points and authorities and declarations. DOHERTY filed points and authorities in opposition to the motion and supporting declarations.

On December 26, 1996, the United States District Court filed a MEMORANDUM AND ORDER as to EVENT, granting the motion for summary judgment. (Another MEMORANDUM AND ORDER, identical except for the name of the plaintiff, was filed by the United States District Court as to DON KING, on December 24, 1996.)

The EVENT case and the DON KING case were ordered consolidated after request by DOHERTY, on February 3, 1997. Judgment upon the granting of the Motion for Summary Judgment was entered on May 5, 1997.

B. Basis of the Decision of the United States District Court

In its Memorandum and Order, the United States District Court granted the motion for summary judgment filed by PACIFIC WEST, deciding the case as a matter of law, finding no legal basis for recovery by DOHERTY against PACIFIC WEST on the basis of implied contractual indemnity or negligence. The court found as follows:

Introduction:

1. EVENT made federal and state claims against DOHERTY;

2. DOHERTY claims he may seek indemnity against PACIFIC WEST; the matter of whether the United States District Court has jurisdiction to adjudicate the claims should be addressed only after the United States District Court determines if DOHERTY may seek such indemnity;

As to the Federal claims for relief (Counts One and Two):

3. A defendant held liable under a Federal statute may seek indemnity or contribution only if such right arises (a) expressly or impliedly by creation of such right by action of Congress, or (b) under Federal common law. No reported cases address the matter of indemnity under either 47 U.S.C. sections 553 or 605;

4. No provision in 47 U.S.C. sections 553 or 605 states or implies a right to indemnity or contribution;

5. Given (4), above, the United States District Court held the court should not create a Federal common law right to indemnity or contribution, for the following reasons: (a) Congress has created a "comprehensive remedial scheme" (page 5 of the MEMORANDUM AND ORDER) which provides for criminal sanctions, civil penalties, and a private right of action; there is a strong presumption Congress did not intend courts to supplement these remedies, **and** (b) these sections provide for a minimum level of statutory damages and increased damages from willful violators;

6. DOHERTY's concern regarding being held liable,

even though he is not at fault, and is without recourse, is taken into account by his ability under the statute to seek to have his damages reduced to the statutory minimum;

7. Creating a Federal common law right to seek indemnity for such damages would undermine the regulatory function of the statute;

8. There is no right under state law to seek indemnity on the Federal claims; *inter alia*, such a position runs afoul of the Supremacy Clause;

As to the state claims (Counts Three and Four):

9. Conversion and intentional interference with prospective economic advantage are intentional torts;

10. California law permits an intentional tortfeasor to obtain indemnity from a concurrent intentional tortfeasor, but does not allow an intentional tortfeasor to seek indemnity against a concurrent tortfeasor who is only negligent or strictly liable.

11. Because DOHERTY has not shown PACIFIC WEST acted intentionally or willfully, California law does not permit him to seek indemnity from PACIFIC WEST for his liability.

Petitioner timely filed a Notice of Appeal on May 30, 1997.

On June 10, 1997, EVENT and DON KING settled their underlying cases with DOHERTY. *Inter alia,* without an admission of liability, DOHERTY agreed to pay the amount of $8000. Plaintiffs agreed to dismiss all state claims; all

parties were to bear their own attorney fees and costs. Said sum was paid, and the underlying state claims, counts three and four, were dismissed.

On July 3, 1997, pursuant to motion by PACIFIC WEST, the United States District Court found DOHERTY liable for attorney fees and costs to PACIFIC WEST and set the amount of attorney fees in the sum of $10,987.50, by order of court, on September 3, 1997.

As petitioner is permitted under law to pursue the remedy of indemnity against PACIFIC WEST, he submits it is appropriate to award him attorney fees, for services performed in the United States District Court and the United States Court of Appeals, Ninth Circuit, under 47 U.S.C. section 553(c)(2)(C) and under 47 U.S.C. section 605(e)(3)(B)(iii).

C. Basis for the Affirmance in the Ninth Circuit

The decision of the United States Court of Appeals, Ninth Circuit, on July 1, 1998, affirmed in all legally significant particulars the decision of the United States District Court. The Petition for Rehearing filed by DOHERTY on July 14, 1998, was denied on February 16, 1999, by the Court of Appeals.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the writ of certiorari for the following reasons:

First, the United States Court of Appeals, Ninth Circuit, decision and United States District Court decision

misperceive the factual difference between the instant case and the line of cases upon which they base their decisions.

Second, the United States Court of Appeals, Ninth Circuit, decision and the United States District Court decision fail to acknowledge the significance of the conflict between their decisions in this case and in the case of **Mortgages, Inc.** v. **U.S. District Court for the District of Nevada** (9th Cir., 1991) 934 F.2d 209 and the case of **Storer Cable Comm.** v. **Joe's Place Bar and Restaurant** (W.D.Ky. 1993) 819 F.Supp. 593. The latter decision within the Sixth Circuit is on the matter of availability of equitable relief where Congress has enacted a statutory scheme, such as presented in the instant case. In the **Mortgages, Inc.** case, equitable relief -- **indemnity** -- was **denied**, albeit in factual circumstances different from those presented in the instant case. In the **Joe's Place** case, equitable relief -- **restitution** -- was **permitted**. This clear conflict between cases within the two circuits on the issue of availability of equitable remedies in litigation of like statutory schemes remains unresolved.

The granting of this petition will permit this Court (1) to fairly adjudicate petitioner's claim, properly distinguishing it from the caselaw upon which the United States Court of Appeals, Ninth Circuit, and United States District Court based their decisions, and (2) to resolve conflicts between decisions of the Ninth Circuit **Mortgage, Inc.**, 934 F. 2d 209, and within the Sixth Circuit **Joe's Place and Bar**, 819 F.Supp.593, on the matter of availability of equitable relief in circumstances of statutory enactments of the type upon which the litigation herein is based.

I

Does Title 47 United States Code, Sections 553 and

605 permit a right to indemnity for innocent aggrieved parties who have been sued pursuant to this title and sections?

A tavern, known as THE MENLO CLUB, a subscriber to cable programming provided by PACIFIC WEST, inadvertently and without fraudulent intent, was the recipient of two programs (boxing matches) from provider, which, in turn, had received two programs from a transmission originator (EVENT); said subscriber recipient showed these transmissions to its patrons.

Does THE MENLO CLUB have the right to seek indemnity relief, by a third party complaint against an intermediary cable programming provider (Pacific West), after transmission originator (Event Entertainment) seeks relief from subscriber-recipient (The Menlo Club)?

The basis for the rulings by the United States Court of Appeals, Ninth Circuit, and the United States District Court was a misunderstanding of the scope and meaning of the **Mortgages, Inc.** case, given the absence of other statutory or case law guidance. Both the United States District Court and the United States Court of Appeals, Ninth Circuit, decisions note there are **no reported cases interpreting** sections 553 and 605 on this point (indemnity relief), and no reported cases appear from a review as of the date of the filing of this petition. **Both courts** further find there is no explicit or implicit right of action for indemnity under either statute, and find there is no basis either in law or public policy for creation by federal courts for such a right. The **holdings of both courts apply** a conclusion based upon a set of facts and statutory schema not relevant to those in the instant statutes. **Further**, the reasoning of the courts below, operates purely by analogy, and not by caselaw or legislative history. **The**

holdings of the courts below cannot stand, especially in light of the case law within the Sixth Circuit that contradicts this reasoning, in circumstances presenting the issue of availability of an equitable remedy in litigation, based upon the same type of statutory scheme as presents itself in the instant case.

The holding of the United States Court of Appeals, Ninth Circuit, in this case was as follows:

> "Doherty points to no support in the Act or legislative history suggesting that Congress intended to create a right to indemnification for violations of the Act. The explicit language of Sections 553 and 605 do not provide any right to indemnification or contribution. There is no indication in the legislative history that Congress intended to grant violators of the Section 553 or Section 605 a right to indemnification. Finally, we find that the remedies set forth in the Act are comprehensive.
>
> The remedial provisions in both Sections 553 and 605 take into consideration the degree of the violator's culpability and provide for reduced damages in those instances where the violator was unaware of the violation. There is no indication in the structure of the remedial provisions that Congress intended a violator to have a right to indemnity.
>
> We also conclude that this is not an appropriate case for the federal courts to recognize a federal common law right. The creation of a right under federal common law is appropriate

only where there are unique federal interests at stake. [Citations.]"

(Memorandum, pp. 3-4.)

The United States Court of Appeals, Ninth Circuit, decision, relies heavily upon **Mortgages, Inc.** case for its holding, as does the decision of the United States District Court. As noted herein, reliance upon this case is entirely misplaced.

In the **Mortgages, Inc.** case, Mortgages, Inc., accepted applications for loans insured by Department of Housing and Urban Development. Certain applications submitted to Mortgages, Inc., were fraudulent, and loans connected therewith defaulted; HUD was required to cover the losses. Mortgages, Inc., agreed with HUD to indemnify HUD for $437,000. In a separate action, Mortgages, Inc., filed a complaint under the False Claims Act, offering the government information Mortgages, Inc., had obtained regarding the fraudulent statements. The government decided to proceed with the action, and Mortgages, Inc., remained as a *qui tam* plaintiff. The alleged fraudulent applicants filed third party actions against Mortgages, Inc., making state law claims for breach of contract. These claims additionally requested full indemnification and/or contribution from Mortgages, Inc. At that point, Mortgages, Inc., moved to dismiss these third party actions, which motion was denied. The United States Court of Appeals, Ninth Circuit, found the requested **mode of relief sought** - mandamus -- to be appropriate, then addressed the substance of the actions by three avenues.

The United States Court of Appeals, Ninth Circuit, made several findings with respect to the requested remedy.

First, the purported ground of *Congressional creation of a right of action*, citing the case of **Texas Industries, Inc.** v. **Radcliff Materials** (1981) 451 U.S. 630:

> "The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with 'unclean hands.' Congress did not intend to create a right of action for contribution or indemnification." (934 F.2d, at p. 213.)

Second, the Ninth Circuit Court said no such right of action arose under Federal common law, as no such right of action is necessary to protect unique federal interests. (934 F.2d, at p. 213, also citing **Texas Industries**, **supra**.)

Third, the United States Court of Appeals, Ninth Circuit, said there is no right of federal courts to fashion a remedy in this case, as "Congress has enacted a comprehensive legislative scheme, including integrated procedures for enforcement, [and, therefore] there is a strong presumption that Congress did not intend the courts to supplement the remedies enacted." The United States Court of Appeals, Ninth Circuit, cited the case of **Northwest Airlines** v. **Transport Workers Union of America** (1981) 451 U.S. 77, at p. 97.

The United States Court of Appeals, Ninth Circuit, held the district court erred when it denied the petitioners' motion to dismiss the third party complaints by defendants, because these claims, if successful, would have the same result as a suit for contribution or indemnity. Mandamus was issued to provide the United States District Court be instructed to vacate its order requiring petitioners to answer these

complaints.

However, **the Court's reliance upon** the **Mortgages, Inc.** case, in the instant case, -- the bedrock of the decisions of the United States District Court and the United States Court of Appeals, Ninth Circuit, -- **is misplaced, for several reasons**.

First, petitioners in the instant case are **not parties with "unclean hands,"** as was true in the Mortgages, Inc., case. It was this *moral opprobrium* that clearly formed the basis for the holding of the United States Court of Appeals, Ninth Circuit, finding no intent by Congress to provide for contribution or indemnity. **There is no showing of unclean hands in the instant case; there is no evidence of such, and no genuine allegation of such in this case**. Therefore, no logical rationale exists for applying a holding to this petitioner, which is based upon a finding as was true in **Mortgages, Inc. intentional wrongdoing**.

Second, the basis for not finding a rationale in federal common law for such remedy to permit recovery by contribution or indemnity "from another wrongdoer" (934 F.2d, at p. 213) is similarly inapplicable in the instant case; **petitioner here is not a wrongdoer**, but simply one who inadvertently played for patrons certain broadcasts obtained by **channel surfing** by use of a remote control device that **comes** with television reception equipment. There has never been an allegation charging petitioner with intentionally pirating any program.

Finally, there is no basis for finding Congress, in the Act, intended to enact a comprehensive regulatory scheme, including enforcement procedures, which would necessarily exclude third party actions for contribution and indemnity

against suppliers (PACIFIC WEST) who retained exclusive ownership, control, and maintenance of the equipment and distribution of the programs by their contract for monthly service to petitioner/recipient.

Respectfully, just as reliance of the United States District Court and the United States Court of Appeals, Ninth Circuit, on the case of **Mortgages, Inc.**, was misplaced, so is reliance on the cases of **Texas Industries**, and **Northwest Airlines**. The **Mortgages, Inc.** case relied upon **Northwest Airlines** case, which relied upon **Texas Industries** case.

In **Northwest Airlines**, **supra**, the United States Supreme Court considered a claim for contribution by airlines found liable under the Equal Pay Act for compensation discrimination against female employees; the airlines sought contribution by the unions representing the employees. The Court held there was no right to contribution. Relevant to the matter of whether Congress intended there be a private right of action, including a right to contribution, were found to be the following: " . . . the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing remedies." (451 U.S. 91).

Further, in **Northwest Airlines**, **supra**, the Court dealt with the issue of an alleged right of contribution by unions that negotiated the very discriminatory pay schemes that formed the basis for the violations of the Equal Pay Act that was the subject of the action. These negotiated labor agreements were the result of **purposeful** action by both employers and unions.

In this case, however, there is **no evidence** -- nor can

any be adduced -- that petitioner (DOHERTY) **engaged purposefully** to obtain subject broadcasts. **Nothing suggests receipt by petitioner of these programs was anything but accidental and innocent**. The circumstances of the instant case are, therefore, completely different than those faced by the Supreme Court in **Northwest Airlines, Inc.**

There is nothing in the relevant statutes as to the four factors set forth in **Northwest Airlines, Inc.** suggesting a right of action for indemnification or contribution would not be available, either explicitly or implicitly.

The United States Court of Appeals, Ninth Circuit, in the instant case in its MEMORANDUM relied upon **Texas Industries, Inc.**, **supra**, and **Mortgages, Inc.**, which relied upon **Northwest Airlines, Inc.** The **Northwest Airlines, Inc.** case relied heavily upon **Texas Industries, Inc.**, case, which was a case of -- **intentional wrongdoing** by the party seeking indemnification or contribution. The **intentional wrongdoing factor -- was present in these cases**, and clearly colored the decision of the United States District Court in the instant case. However, **in the instant case, there is no intentional wrongdoing; none proven, none even alleged**. Doherty was not a pirate of Event's proprietary programming.

In **Texas Industries, Inc.**, **supra**, the United States Supreme Court considered a claim for contribution by a cement manufacturer against other participants in unlawful conspiracy alleged by purchaser of cement, a construction company. The Court noted no specific authorization for contribution was set forth in the Sherman and Clayton Acts, therefore, no basis for this remedy by one "wrongdoer" or "co-conspirator" against another. Additionally, the Court found Congress had enacted a **comprehensive regulatory and enforcement scheme** without mention of indemnity and

contribution as part of a statutory scheme, and so would not include indemnity and contribution **sua sponte**. The latter scheme represents a quantum leap from the type of small-scale, limited scheme set forth in the instant statutes, and cannot be held to be comparable in scope; there is no basis for finding some type of implicit rejection of the remedies of indemnity and contribution. Again, the conduct in that case (**Texas Industries, Inc.**) was **intentional**, not inadvertent, as was true in the instant case. Although there is no explicit recognition of these remedies in the statutes, **petitioner submits there are few instances of such recognition in specific regulatory or remedial statutes; recognition of these remedies -- apparently -- being so common as to not require restatement**. Indeed, the fact the status of an unintentional violator, of section 605 is recognized, lends logical credence, above and beyond a general applicability of indemnity and contribution remedies, to the existence of such remedies in this specific statutory context.

By granting of this petition, **this Court will have the opportunity** to rectify decisions of the United States District Court and the United States Court of Appeals, Ninth Circuit, that are erroneous as a matter of law, as to the issues in this case. Additionally, by granting this petition, the Court will be permitted to resolve a conflict between cases, within two circuits (Sixth and Ninth) on issues that lie at the gravamen of this case.

Significantly, there is a case within the United States Court of Appeals, Sixth Circuit, whose conclusion as to the availability of equitable remedies in litigation arising out of a statutory scheme of the type at issue herein, that is at odds with the decision of the United States Court of Appeals, Ninth Circuit, herein, and the **Mortgages, Inc.** case. The case of **Storer Cable Comm.** v. **Joe's Place Bar and Restaurant**

(W.D. Ky. 1993) 619 F.Supp. 593, the United States District Court for the Western District of Kentucky, considered an issue relating to the applicability of the law of civil procedural and equitable remedies to the issue at bar.

The **Joe's Place** case was decided after **Mortgages, Inc.** case. However, the United States Court of Appeals, Ninth Circuit, failed to address the **Joe's Place** case, even though it clearly conflicts with **Mortgages, Inc.** case, and was cited by petitioner herein in briefing, both initially and in the petition for rehearing.

Comparison of the instant case and the **Joe's Place** case is unmistakable. In the instant case, the overriding issue on appeal is the availability of the remedy of indemnity; in the **Joe's Place** case, the issue was availability of a civil jury trial. In the instant case, the relevant statutory law is 47 U.S.C. sections 553 and 605; in the **Joe's Place** case, the relevant statutory law is 47 U.S.C. sections 553 and 605 (referred to by the United States District Court in that case as "the piracy acts"). **The United States District Court, Western District of Kentucky, found no applicability of the right to jury trial, but found the matter properly triable only before the bench, an equitable procedure. This procedure leads to an equitable remedy, restitution**.

The **Joe's Place** case is significant to the case at bar for two reasons.

First, no reliance upon cases utilizing the logic of the **Mortgages, Inc.** case was undertaken in that case, and no mention was made therein to the **Mortgages, Inc.** case; in other words, no reliance upon a finding of Congressional enactment of a "comprehensive remedial scheme" in finding no remedy of jury trial, which was so necessary to the

decision in **Mortgages, Inc.** and the decision below in the case at bar. **Similarly**, as in **Joe's Place** case, petitioner herein asserts the inapplicability of a "comprehensive statutory scheme analysis" to his case.

Second, one basis for finding applicability of a bench trial in the **Joe 's Place** case, was the finding by the court of the **nature** of the remedy sought in this case: the statutory damage provisions are basically **restitutionary**, and restitution is an **equitable** remedy for which a jury trial has not been traditionally available. Petitioner herein seeks a remedy of **indemnity**; the indemnity remedy is **also** an equitable remedy, by the clear logic of the **Joe's Place** case; indemnity should be found to be a proper remedy for consideration of the court.

The parallels between the **Joe's Place** case and the case at bar is clear. **First**, there is no "comprehensive remedial scheme" which renders inapplicable the remedy of indemnity. **Second**, just as the equitable remedy of restitution is available to a party in a proper factual setting, so logically must the remedy of indemnity. The decision of the United States District Court and the United States Court of Appeals, Ninth Circuit, in the instant case is in error; the Courts in the instant case failed to acknowledge the applicability -- **in a proper factual setting, a setting which petitioner was not permitted to present to the court -- the remedy of indemnity**. The ruling of the district court on the Motion for Summary Judgment precluded the opportunity for petitioner to even proffer evidence to support its contention of indemnity being a proper remedy.

Additionally, in the case of **Don King Productions/Kingvision** v. **Lovato** (N.D. Cal. 1995) 911 F.Supp. 419, the court addressed, indirectly, the matter of

whether the two statutes -- 47 U.S.C. 553 and 605 -- constituted a "comprehensive remedial scheme". Before the court in that case was a question of standing; a recipient of a signal challenged the standing of the owner of the distribution rights of a fight broadcast (not the cable operator) to sue under 47 U.S.C. sections 553 and 605. The court found the owner of these rights to have standing. Important to the instant case, however, is the discussion of the court in the **Lovato** case of the **nature of 47 U.S.C. sections 553 and 605**. The issue was raised in **Lovato** of alleged redundancy between the statutes. Noting the similarity between the remedy sections of the two acts, the court stated:

> **"several courts have recently struggled with exactly what activity is covered by each section and whether a plaintiff may recover under both sections." (911 F.Supp at p. 422.)**

Title 47, U.S.C., section 553 covers cable communications, while Title 47, U.S.C., section 605 covers radio communications (which term may also include cable communications), said the court. The court continued:

> **"The two major unresolved questions are whether section 605 also covers cable-borne communications, and, if so, whether a plaintiff may recover under both sections for the same wrongful activity." (911 F.Supp., at p. 422.)**

The fact this question remained as of 1995 (and, apparently, thereafter, to the present day) "unresolved", does answer rather emphatically the question of whether these statutes constitute a "comprehensive remedial scheme", which

precludes a finding of the possibility of the remedy of indemnity; the answer is, **there is no comprehensive scheme**. Therefore, there is no support for the finding by the United States District Court and the United States Court of Appeals, Ninth Circuit, in this case, as to unavailability of the remedy of indemnity. The United States District Court and the United States Court of Appeals, Ninth Circuit, **erred as a matter of law**, and the judgment based upon this erroneous MEMORANDUM AND ORDER must be reversed.

Petitioner must be permitted to proffer evidence as to whether he has a factual basis for indemnity. Petitioner was an unintentional actor, **not an intentional** wrongdoer (pirate) as in the **Mortgages, Inc.**, **Northwest Airlines, Inc.**, and **Texas Industries, Inc.**, cases.

II

ASSUMING A RIGHT OF INDEMNITY, MAY AN AGGRIEVED PARTY HAVE AN AWARD OF ATTORNEY FEES, FOR SERVICES PERFORMED IN THE UNITED STATES DISTRICT COURT AND IN THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, TO PRESENT EVIDENCE IN PROSECUTION OF A CLAIM FOR INDEMNITY?

The United States District Court reduced the amount of allowable attorney fees awarded to PACIFIC WEST from the sum of $52,675.00 originally claimed by PACIFIC WEST to $10,987.50. Among the factors cited by the court militating in favor of the reduction of the award, were duplication of effort in the DON KING and EVENT actions, and the fact the underlying cases were settled for a total of $8000.00, $4000.00 for each case.

Assuming the decisions of the United States Court of Appeals, Ninth Circuit, and the United States District Court are affirmed as to the above points, Petitioner submits no award of attorney fees to PACIFIC WEST is appropriate, as

the PACIFIC WEST position regarding attorney fees and the ruling of the United States District Court is erroneous.

Petitioner proffers the decision of the district court in the case of **TCI of Illinois** v. **Carpenter** (N.D. Ill., 1994) 849 F.Supp. 326, in which the court, after trial found nominal damages of $420.00 as appropriate award to a cable television company, for unlawful exhibition of cable televised championship fight by a tavern. Relying on the United States Supreme Court case of **Farrar** v **Hobby** (1992) 506 U.S. 103, 113 S.Ct. 566, 121 L. Ed.2d 494, holding an award of attorney fees should follow upon the "degree of success obtained" by the prevailing party, the District Court trebled the nominal damage award, added taxable claimed costs of $188.35, and awarded a total of $1448.35 in attorney fees, as against a claimed amount of $13, 600.56.

Lastly, petitioner submits, the decisions of the United States District Court and the United States Court of Appeals, Ninth Circuit, were erroneous as a matter of law. Should Petitioner should be permitted under the law, to present facts to support his contention, that he should be entitled to indemnity from PACIFIC WEST, then he is entitled to attorney fees under 47 U.S.C. section 553(c)(2)(C) and under 47 U.S.C. section 605(e)(3)(B)(iii), for services performed, in the proceedings in the United States District Court and in the United States Court of Appeals, Ninth Circuit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
VICTOR WAID
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 1, 1998]

No. 97-16046

DC Nos.
CV-95-01966-WBS/PAW
CV-96-00063-WBS/PAW

BRUCE DOHERTY, an individual, and dba The Menlo Club, Third-party-plaintiff, Appellant,

v.

WIRELESS BROADCASTING SYSTEMS OF SACRAMENTO, INC, a California corporation dba Pacific West Coast Cable Television, Third-party-defendant-Appellee.

ORDER

Before: LAY,[1] KOZINSKI, and T.G. NELSON, Circuit Judges.

The Appellant's petition for rehearing is DENIED.

---

[1] Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

United States District Court for
the Eastern District of California
March 2, 1999

CERTIFICATE OF SERVICE

2:95-cv-01966

Event Entertainment

v.

Waid

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 2, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerks's office.

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Jack L. Wagner, Clerk
/s/_____
by: Deputy Clerk

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Re: 2:95-cv-01966

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed February 16, 1999]

No. 97-16046

BRUCE DOHERTY, an individual, and dba The Menlo Club, Third-party-plaintiff, Appellant,

v.

WIRELESS BROADCASTING SYSTEMS OF SACRAMENTO, INC, a California corporation dba Pacific West Coast Cable Television, Third-party-defendant-Appellee.

MEMORANDUM** & ORDER

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted May 12, 1998
San Francisco, California

Before: LAY,*** KOZINSKI and T.G. NELSON, Circuit Judges.

Event Entertainment, Inc. ("Event") and Don King Productions/KingVision ("King") brought suit against Bruce Doherty for violations of 47 U.S.C. § 553, enacted as part of the Cable Communications Policy Act of 1984, 47 U.S.C. § 605, enacted as part of the Communications Act of 1934 (collectively, the "Act"), as well as state law claims for conversion and intentional interference with prospective economic advantage. In each case, Doherty filed a third-party complaint against Wireless Broadcasting Systems of Sacramento, Inc., d/b/a Pacific West Cable Television ("Pacific") for indemnity and contribution, alleging claims of implied contractual liability and negligence.

Doherty consented to entry of judgment against him on the federal claims in the amount of $ 8,000 and Event and King agreed to dismiss the state claims with prejudice. On the indemnity claim, the district court granted summary judgment in favor of Pacific, finding that, as a matter of law, no right to indemnity exists for violations of the Act or for the intentional state law claims. Doherty appeals the grant of summary judgment.

*** Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

Pacific then filed a motion for attorneys' fees seeking reimbursement in the amount of $ 52,675.00. The district court granted the motion, but reduced the fee award to $ 10,987.50 because it determined the legal issue raised by this case could have been decided by a motion to dismiss, motion for judgment on the pleadings or an early motion for summary judgment, and discovery was therefore unnecessary. Pacific urges the district court's reduction of the attorneys' fee award was unjustified.

I. Right to Indemnification

In his complaint, Doherty asserted both federal and state claims to indemnification. On appeal, we need only address Doherty's claim of a federal right to indemnification under the Federal Communication Act.

A defendant held liable under a federal statute has a right to indemnification or contribution from another only if such right arises: (1) through the affirmative creation of a right of action by Congress, either expressly or implicitly, or (2) under the federal common law. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 638, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981); Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 90, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981); Mortgages, Inc. v. United States Dist. Court for D. of Nev., 934 F.2d 209, 212 (9th Cir. 1991). "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." Northwest Airlines, 451 U.S. at 91. Where Congress has enacted a comprehensive legislative scheme, there is a strong presumption that Congress did not intend the courts to supplement the statutory remedies. Mortgages, 934 F.2d at 213.

Doherty points to no support in the Act or legislative history suggesting that Congress intended to create a right to indemnification for violations of the Act. The explicit language of Sections 553 and 605 do not provide any right to indemnification or contribution. There is no indication in the legislative history that Congress intended to grant violators of Section 553 or Section 605 a right to indemnification. Finally, we find that the remedies set forth in the Act are comprehensive. The remedial provisions in both Sections 553 and 605 take into consideration the degree of the violator's culpability and provide for reduced damages in those instances where the violator was unaware of the violation.[1] There is no indication in the structure of the remedial provisions that Congress intended a violator to have a right to indemnity.

We also conclude that this is not an appropriate case for the federal courts to recognize a federal common law right. The creation of a right under federal common law is appropriate only where there are unique federal interests at stake. Texas Industries, 451 U.S. at 640; Mortgages, 934 F.2d at 213. There are no such unique federal interests involved in this case. We therefore affirm the grant of summary judgment in favor of Pacific.

II. Reduction of Attorneys' Fee Award

The district court granted Pacific's motion for attorneys' fees, but reduced the award to $ 10,987.50. The district court's award of attorneys' fees is discretionary; this court reviews such an award under an abuse of discretion standard. See Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1318 (9th Cir. 1997). The district court concluded that Pacific did not need to undertake discovery

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[1] See 47 U.S.C. § 553 (c) (3) (C)1994; id. § 605 (e) (3) (C) (iii).

because the issue in this case involved a purely legal question. Pacific argues that, because the legal issue is one of first impression, it had to file a motion for summary judgment rather than a motion for judgment on the pleadings.

Pacific is the prevailing party and is entitled to an award for reasonable attorneys' fees.[2] Pacific's claim that the district court erred in reducing its fee award is not properly before us. Pacific seeks to enlarge its rights under the judgment of the district court as to the amount of attorney fees, but failed to file a separate cross appeal as is required under Fed. R. App. P. 4(a)(3).

The judgment of dismissal and the award of attorneys' fees are hereby AFFIRMED.

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[2] The subscription agreement between the parties provided for attorney fees to be awarded to the prevailing party.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed February 16, 1999]

No. 97-16046

CT/AG#: CV-95-01966-WBS/PAW
CT/AG#: CV-96-00063-WBS/PAW

BRUCE DOHERTY, an individual, and dba The Menlo Club, Third-party-plaintiff, Appellant,

v.

WIRELESS BROADCASTING SYSTEMS OF SACRAMENTO, INC, a California corporation dba Pacific West Coast Cable Television, Third-party-defendant-Appellee.

ORDER & JUDGMENT
Entered: February 16, 1999

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF CALIFORNIA

[Filed December 26, 1996]

No. CIV. S-95-1966 WBS\PAN

EVENT ENTERTAINMENT, INC.)
Plaintiff,)
)
v.)
)
BRUCE DOHERTY, an individual;)
BRUCE DOHERTY dba THE)
MENLO CLUB; TREMOR'S)
CLUB, an entity of unknown form;)
and DOES 1 through 1000, inclusive)
Defendants.)
)

BRUCE DOHERTY, an individual,)
and dba The Menlo Club,)
Plaintiff/Defendant)
)
v.)
)
WIRELESS BROADCASTING)
SYSTEMS OF SACRAMENTO,)
INC, dba Pacific Cable Television,)
a California Corporation)
Defendant.)

Memorandum & Order 12/26/96

MEMORANDUM AND ORDER

Third-party defendant Wireless Broadcasting Systems of Sacramento, dba Pacific West Cable Television ("PWC"), moves for summary judgment on defendant Bruce Doherty's third-party complaint against it. Fed. R. Civ. P. 56. The issue is whether a person sued under 47 U.S.C. § 553 or § 605 for displaying an unauthorized broadcast of a boxing match to commercial patrons may seek indemnity from a satellite television subscription company for failing to "scramble" the signal. For the reasons stated below, the court holds that no such right of indemnity exists.

I.

BACKGROUND

This action concerns the unauthorized broadcasts of the De La Hoya v. Molina and Toney v. Griffen boxing matches on February 18, 1995. Plaintiff Event Entertainment, Inc. ("Event") alleges that it contractually acquired the proprietary rights to distribute, promote, and exhibit the boxing matches via closed circuit television. Plaintiff claims it entered into agreements with commercial entities which became entitled as licensees to publicly exhibit the boxing matches to patrons in their establishments. Plaintiff sued several parties, including Doherty, for exhibiting the boxing match to patrons without an agreement with plaintiff to do so. It alleged claims under 47 U.S.C. § 553, enacted as part of the Cable Communications Policy Act of 1984, 47 U.S.C. § 605, enacted as part of the Communications Act of 1934 (collectively, the "Act"), as well as state law claims for conversion and intentional interference with prospective economic advantage.

Doherty admits he received the boxing matches and displayed it to patrons at his commercial establishment, the Menlo Club. (Third-Party Plaintiff's Response to Statement of Undisputed Facts ¶23.) Doherty further admits he received and displayed the boxing matches without prior request or arrangement with either Event or PWC. (Id. ¶ 14.) He claims, however, that he "involuntarily" received the boxing matches at the Menlo Club through the satellite receiving equipment installed by PWC. Because he received the match without having ordered it, he assumed that PWC had made the programs available to show to his commercial patrons. (Doherty Decl. ¶¶ 12, 20.)

Doherty has filed a third-party complaint against PWC for "Implied Contractual Indemnity" and "Indemnity for Negligence," alleging that PWC's failure to "scramble" the signal for the boxing match has subjected him to liability absent any fault of his own. PWC moves for summary judgment on Doherty's claims, arguing that the third-party complaint fails as a matter of law.

II.

STANDARD OF REVIEW

Summary judgment is appropriate if the record, read in the light most favorable to the non-moving party, demonstrates no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). At the summary judgment stage the question before the court is

whether there are genuine issues for trial. The court does not weigh evidence or assess credibility. Id.

III.

DISCUSSION

A defendant may file, as a third-party plaintiff, a complaint against "a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed. R. Civ. P. 14(a). Doherty states that "the major issue is whether there is [supplemental] jurisdiction enabling the court to adjudicate Doherty's claims" against PWC. That is not the issue. Only after the court determines that Doherty may seek indemnity can it decide whether it has jurisdiction to adjudicate those claims.

Event has asserted both federal and state law claims against Doherty. The scope and limitation of Doherty's right to indemnity for damages resulting from having violated a federal statute is governed by federal law. See Mortgages, Inc. v. U.S. Dist. Court for the Dist. of Nevada, 934 F.2d 209, 212 (9th Cir. 1991) (when liability is grounded on a federal statute, the court must look to federal law, not state law, to determine a defendant's right to indemnity); Gilmore v. List & Clark Constr. Co., 866 F. Supp. 1310, 1312-13 (D. Kan. 1994) (state law creating right to indemnity or contribution inapplicable where the defendant's liability for which indemnity is sought arises solely under a federal statute). In contrast, the scope and limitation of his right to indemnity for liability grounded on the state law claims is governed by state law. See Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 96-7 n.38, (1981) (acknowledging a right to contribution under state law in cases in which state law supplied the rule of

decision). Doherty's right to indemnity under each set of claims must therefore be analyzed separately. The court assumes for purposes of this analysis that Doherty will be liable under all claims asserted against him.

A. Federal Claims

Doherty argues he is entitled to indemnity from PWC because he relied on PWC to provide him with properly functioning equipment and to block his receipt of programs he was not authorized to view, and PWC's failure to do so proximately caused his liability under 47 U.S.C. § 553(a)(1) and § 605(a), which prohibit receiving, viewing, and publishing misappropriated signals acquired via satellite. A defendant held liable under a federal statute has a right to indemnity or contribution from another who has also violated the statute only if such right arises through (1) the express or implicit creation of a right of action by Congress, or (2) the power of the courts to formulate federal common law. Mortgages, Inc., 934 F.2d at 212. There are no reported cases addressing the availability of indemnity or contribution under either § 553 or § 605 of the Act.

Nothing in the Act mentions or implies a right to indemnity or contribution. In the absence of such guidance, the court should not create a federal common law right to indemnity or contribution for two reasons. First, Congress has established a comprehensive remedial scheme that provides for criminal penalties, civil penalties, and a private right of action allowing aggrieved persons to seek damages, injunctive relief, and attorneys' fees. 47 U.S.C. § 553(b)-(c) and § 605(e). Where, as here, Congress has done so, there is a strong presumption that Congress did not intend the courts to supplement the remedies enacted. Mortgages, Inc., 934 F.2d at

213. Second, both § 553 and § 605 provide for a minimum level of statutory damages that must be awarded to an aggrieved person, even if the violator was not aware, and had no reason to believe, that his or her acts constituted a violation of the Act. 47 U.S.C. § 553(c)(3)(C) and § 605(e)(3)(C)(iii). In contrast, the Act allows an aggrieved person to recover substantially increased damages from willful violators. Id. at § 553(c)(3)(A)-(B) and § 605(e)(3)(C)(i)-(ii).

Doherty urges the court to create a right of indemnity because he is without fault and thus should be entitled to some form of recourse. But the statute already takes into account his degree of culpability by allowing him, as an alleged unknowing violator, to seek to have his damages reduced to the statutory minimum. Creating a federal common law right to seek indemnity for such damages would undermine the regulatory function of the Act itself. See Laventhol, Krekstein, Horwath & Horwath v. Horwitch, 637 F.2d 672, 676 (9th Cir. 1980) (where purpose of the act is regulatory rather than compensatory, permitting indemnity would undermine the statutory purpose of assuring diligent compliance). The court therefore declines to create a federal common law right to seek indemnity or contribution for violations of § 553 or § 605 of the Act.

Alternatively, Doherty contends that state law creates a right to indemnity on the federal claims. The Ninth Circuit, however, has rejected this precise contention. See Mortgages, Inc., 934 F.2d at 214 (stating that "[b]ecause there is no basis in the [False Claims Act] or federal common law to provide a right to contribution or indemnity in a [False Claims Act] action, we conclude that there can be no right to assert state law counterclaims that, if prevailed on, would end in the same result"); see also Lyle v. Food Lion, Inc., 954 F.2d 984, 987

(4th Cir. 1992) (to engraft an indemnity cause of action under state law upon an otherwise comprehensive federal statute "would run afoul of the Supremacy Clause of the Constitution") (quoting LeCompte v. Chrysler Credit Corp., 780 F.2d 1260, 1264 (5th Cir. 1986)); Gilmore, 866 F. Supp. at 1312-13 (state law creating right to indemnity or contribution inapplicable where the defendant's liability, for which indemnity or contribution is sought, arises under a federal statute). Accordingly, Doherty cannot seek indemnity for his liability under § 553 or § 605 of the Act.

B. State Claims

As discussed above, Doherty's ability to seek indemnity for his liability under the state law causes of action is governed by state law. The court therefore looks to California law to determine whether Doherty is entitled to seek indemnity for those claims.

Doherty has been sued for conversion and for intentional interference with prospective economic advantage. Conversion is an intentional tort. Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 810 (1994). Intentional interference with prospective economic advantage is, by description, also an intentional tort. See Blank v. Kirwan, 39 Cal. 3d 311 (1985).

Doherty's claims for indemnity, on the other hand, rest on the theories that PWC was negligent and breached its duty to properly perform contractual obligations. These theories do not require, nor has Doherty offered any evidence to show, that PWC's actions were willful or intentional. While California's equitable indemnity doctrine permits an intentional tortfeasor to obtain indemnity from a concurrent intentional tortfeasor,

Baird v. Jones, 21 Cal. App. 4th 684, 688 (1994), California courts have not gone so far as to allow intentional tortfeasors to seek indemnity against a concurrent tortfeasor who is only negligent or strictly liable. See id. at 690 n.4; Weidenfeller v. Star & Garter, 1 Cal. App. 4th 1, 6 (1991) (an intentional tortfeasor cannot rely on someone else's negligence to shift responsibility for his or her own conduct) (citing cases). Because Doherty has neither alleged nor shown that PWC acted intentionally or willfully, California law does not permit him to seek indemnity from PWC for his liability for conversion or intentional interference with prospective economic advantage.

IV.

CONCLUSION

Because Doherty cannot properly seek indemnity for any liability he may incur in the underlying lawsuit, PWC's motion for summary judgment on Doherty's third-party complaint for indemnity against it must be granted.

IT IS THEREFORE ORDERED that third-party defendant's motion for summary judgment be, and the same hereby is, GRANTED.

DATED: December 19, 1996

/s/_____
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
December 26, 1996

CERTIFICATE OF SERVICE

2:95-cv-01966

Event Entertainment

v.

Waid

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 26, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Victor L. Waid
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Sacramento, CA 95864-4936

Sandra Louise Sava
Jones and Dyer
1800 J Street
Sacramento, CA 95814

Jack L. Wagner, Clerk

/s/_____
BY: Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed May 5, 1997]

No. CIV. S-95-1966 WBS\PAN

EVENT ENTERTAINMENT, INC.)
Plaintiff,)
)
v.)
)
BRUCE DOHERTY, an individual,)
BRUCE DOHERTY dba THE)
MENLO CLUB; TREMOR'S)
CLUB an entity of unknown form;)
and DOES 1 through 1000,)
inclusive,)
Defendants.)
)

BRUCE DOHERTY, an individual,)
and dba THE MENLO CLUB,)
Plaintiff/Defendant,)
)
v.)
)
WIRELESS BROADCASTING)
SYSTEMS OF SACRAMENTO,)
INC, dba PACIFIC WEST CABLE)

TELEVISION, a California Corp.,)
Defendant.)
_____)

JUDGMENT IN A CIVIL CASE

The court previously granted the motion for summary judgment in favor of third-party defendant Wireless Broadcasting Systems of Sacramento, Inc., dba Pacific West Cable Television and against third-party plaintiff Bruce Doherty. All issues having been resolved with respect to the third-party complaint, there is no just reason for delay in the entry of judgment thereon.

IT IS ORDERED AND ADJUDGED that Judgment be, and the same hereby is, ENTERED against third-party plaintiff BRUCE DOHERTY and for third-party defendant WIRELESS BROADCASTING SYSTEMS OF SACRAMENTO, INC., dba PACIFIC WEST CABLE TELEVISION, a California corporation.

DATED: May 1, 1997

/s/_____

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed September 3, 1997]

EVENT ENTERTAINMENT, INC. Plaintiff, v. BRUCE DOHERTY, an individual, BRUCE DOHERTY dba THE MENLO CLUB, et al., Defendants.	)	No. CIV. S-95-1966 WBS/PAN
DON KING PRODUCTIONS/KINGVISION, Plaintiff, v. JOHN C. FERREIRA, an individual, JOHN C. FERREIRA, dba TIME OUT SPORTS BAR AND GRILL, et al., Defendants.	)	No. CIV. S-96-0063 WBS/PAN

AND RELATED THIRD-PARTY)
ACTIONS)
_____)

ORDER

By Order filed July 1, 1997, the court ruled that third-party defendant Wireless Broadcasting Systems of Sacramento, Inc., dba pacific West Cable Television ("PWC"), was entitled an award of attorneys' fee. PWC now submits documentation to support its request for $52,675 in fees.

Reasonable fees must be determined by first calculating the "lodestar," which is found by multiplying the number of hours reasonably expended by a reasonable hourly rate. Chalmer v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986), as amended, 808 F.2d 1373 (9th Cir. 1987). There is a strong presumption that the lodestar is the appropriate fee award. See Long v. United States, 932 F.2d 1309, 1314 (9th Cir. 1991). The court may adjust the lodestar figure, up or down, if various factors overcome the presumption of reasonableness and indicate that an adjustment is necessary. See Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975).

PWC's counsel claim that they spent a total of 308.5 hours defending the third-party actions on PWC's behalf. The general breakdown of hours is as follows. In Don King, Sandra J. Sava spend 114.2 hours and Amy Northam, a paralegal, spent 5.6 hours. In Event Entertainment, Sava and

Brian O'Connor, an attorney in Sava's office, collectively spent 185.2 hours and Northam spent 3.5 hours.[1]

Careful review of the timesheets submitted in support of the requested fees demonstrate that many of the fees incurred were unnecessary. PWC prevailed on their motions for summary judgment not on the facts, but solely on the law. Regardless of the underlying facts, the law did not provide defendant Bruce Doherty with a right to seek indemnity from PWC for his alleged conduct.

Where, as here, the law is strongly in favor of a defendant regardless of the underlying facts, reasonable counsel would not incur the great expense of discovery before seeking to dispose of the case on the legal grounds. Instead, reasonable counsel would attack the complaint against their client by way of either a motion to dismiss, motion for judgment on the pleading, or an early motion for summary judgment.[2]

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[1] Although both actions were identical, additional hours were spent on Event Entertainment because the third-party complaint in that case was filed more than one month prior to the filing of the third-party complaint in Don King.

[2] PWC attempts to justify its failure to file a motion to dismiss by indicating that the court denied its request for an extension to respond to the third-party complaint against it. Even assuming this is a legitimate justification, PWC has failed to indicate why it could not have brought a motion for judgment on the pleadings, or at least moved for summary judgment before all of the discovery was undertaken.

Accordingly, PWC will not be awarded attorneys' fees for any actions except those that relate to (1) its initial review of the third-party complaint against it and activities related thereto, (2) researching, briefing, and arguing the legal issues upon which it prevailed its motion for summary judgment, or (3) the motions for attorneys' fees and costs. The attorneys' fees relating to time spent pursuing discovery, designating experts, preparing or objecting to declarations in support or in opposition of the motion for summary judgment, and taking actions in preparation for a possible appeal will not be recoverable.

The timesheets indicate that the following hours apparently were spent: In Don King, counsel spent 14.7 hours on the initial evaluation,[3] 28.1 hours on the legal issues related to the motion for summary judgment (11.8 of the 39.9 hours were eliminating as relating to the preparation of declarations and evidentiary exhibits), and 17.2 hours relating to recovery of attorneys' fees and costs; In Event Entertainment, 18.2 hours were expanded on the initial evaluation of the case, 33.9 hours on the legal issues relating to the motion for summary judgment (25.9 of the 59.8 hours were eliminated as relating to the preparation of declarations and evidentiary exhibits), and 20.4 hours relating to recovery of attorneys' fees and costs.

The hours spent on these activities are not reasonable given the value of the case (which the underlying plaintiffs

---

[3] The activities include reviewing the third-party complaint, preparing an initial evaluation report, and drafting the answer to the third-party complaint.

settled for $8,000), the relatively straight forward issues of law relating to Doherty's entitlement to indemnity, and the fact that the legal issues involved in both cases were identical. No duplication of effort should have been required in the two cases. In fact, the briefs in support of the motions for summary judgment were identical and were filed and argued at the same time. Moreover, the initial work in Don King should have required little effort since the third-party complaint was virtually identical to the one filed in Event Entertainment over a month earlier. The court therefore finds that the hours spent in Event Entertainment accurately represents the reasonable number of hours spent on the two cases combined.

Accordingly, 72.5 hours were reasonably expended on the two cases. Of those hours, 42.5 will be allocated to Event Entertainment and 30 will be allocated to Don King. This allocation is made because the third-party complaint in Event Entertainment was filed over one month before the one in Don King, and because 30 hours represents half of the hours actually spent on the relevant issues in Don King.

Doherty does not contest the reasonableness of the hourly rate - - $175/hour in Don King and $135/hour in Event Entertainment[4] - - and the court finds that those rates are reasonable. The lodestar award thus calculates to $5,250 (30 hours x $175/hour) in Don King and $5,737.50 (42.5 hours x $135/hour) in Event Entertainment, for a total lodestar

---

[4] The hourly rate differs because the defense in Event Entertainment was assumed by PWC's insurance carrier, while the defense in Don King was not.

figure of $10,987.50.

The court is mindful that PWC obtained all the results it could have possibly hoped for, including a published decision in their favor on an issue of first impression. The court therefore finds that no factors justify a departure from the lodestar amount.

IT IS THEREFORE ORDERED that third-party defendant's motion for attorneys' fees be, and the same hereby is, GRANTED in the amount of $10,987.50.

DATED: September 2, 1997

/s/_____
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
September 3, 1997

CERTIFICATE OF SERVICE

2:95-cv-01966

Event Entertainment

v.

Waid

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 3, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Matthew J. Webb
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Suite One
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Sandra Louise Sava
Jones and Dyer
1800 J Street
Sacramento, CA 95814

Jack L. Wagner, Clerk

/s/_____
BY: Deputy Clerk

PROOF OF SERVICE

I am a citizen of the United States and a resident of and employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 2625 Fair Oaks Blvd., Suite 1, Sacramento, California 95864-4936.

On this date, I served the foregoing document(s) described as: **CIVIL APPEALS DOCKETING STATEMENT AND EXHIBITS "C AND H1 THROUGH I7"** on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties/counsel, addressed as follows:

SANDRA SAVA
JONES & DYER
1800 J STREET
SACRAMENTO CA 95814

The following is the procedure in which service of this document was effected:

> U.S. POSTAL SERVICE (Placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a U.S. Mailbox in the County of Sacramento, California after the close of the day's business.)

I declare under penalty of perjury under the law of United States of America the foregoing is true and correct and this document was executed at Sacramento, California on September 11, 1997.

/s/ _____
MARNIE GANGL, declarant